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MATERIAL EXCERPTS FROM TESTIMONY OF GEORGE A NOWICKI

BY: MR. BROWN:

Q: Would you state your full name, please?

A: George A. Nowicki.

. . . .

Q: You are with the Alcohol and Tobacco Tax?

A: Yes sir, that's correct.

. . . .

Q: Now, were you participating in an investigation concerning an illegal distillery on the 30th. day of January 1968 over in Clay County, Georgia?

A: Yes, I was. (R. 14).

. . . .

Q: All right, tell us if you will what you wera doing over in Clay County that morning? Were you looking for a still or what were you doing?

A: That morning we were looking for a distillery behind a residence in the southern part of Clay County.

. . . .

Q: Had you ever heard the name of Ed Brookins before you went to Clay County?

A: Yes I had many times.

Q: What was his reputation with the Alcohol and Tobacco Tax? (R. 15).

Q: Let me ask my question again: Did you know of any cases which had been made against Ed Brookins in the past by the Alcohol and Tobacco Tax agents in the Middle District of Georgia?

A: Yes, I did.

Q: And was he what was known as a major violator?

A: Yes,he was; he was a major violator in our post of duty.

. . . .

Q: Did you locate an illegal distillery behind his house or in the general yicinity of his house?

A: Yes, we did.

Q: Was someone working that distillery when you found it?

A: Yes sir.

Q: And that was the co-defendant who has pled guilty in this case, James Johnson, is that right? (R. 17).

A: Charlie Johnson.

. . . .

Q: Now, did you station yourself somewhere to watch that distillery?

A: Yes, I did.

Q: And why did you do that rather than goingron in and arresting Johnson?

A: We were expecting the owner of the distillery to come down to it.

Q: How far were you from the distillery watching it?

A: Approximately 25 yards.

. . . .

Q: From where you were positioned, could you see the distillery?

A: Yes, I could.

Q: Was it in operation?

A: Yes, it was.

. . . .

Q: Did it have any odor?

A: There was an odor of mash. (R. 18).

. . . .

Q: All right now, I'll ask you if you saw the defendant, Ed Brookins, while you were observing this still?

A: Yes, I did.
Q: And where did you see him?
A: I saw him walking through the woods.
Q: Now, tell us where he was walking in relation to the still and in relation to where you were?
A: He was walking straight towards the distillery and he was coming, I was down beside the still - and he was coming into it from up above me.

. . . .

Q: All right , what did you do when you saw Ed Brookins?
A: I let him keep walking toward me.
Q: Could you tell whether or not he saw you?
A: He did and then he stopped walking.
Q: How far away from you was he before he saw you?
A: Approximately 10 yards. (R. 19).
Q: When he stopped and looked at you, what did you do?
A: I approached him.
Q: And why did you approach him?
A: With the intention to arrest him.
Q: What did you intend to arrest him for?
A: Possessing an unregistered distillery.

. . . .

Q: Now, you walked up to Brooks; what did you say to him or did you see him with anything? (R. 20).
A: He was carrying two paper bags.

. . . .

Q: Did you take a look at those paper sacks?
A: Yes, I did.
Q: And what did you find?
A: In one paper sack, I found 25 corks and a severed jug spout, plastic jug spout.
Q: All right, what about the other sack?

A: I found a lunch.

. . . .

Q: And what did you do after O'Steen got to where you were standing?

A: Prior to the arrival of Mr. O'Steen, I placed Mr. Brookins under arrest; and when Mr. O'Steen came up, (R. 21), I told him what we had there.

. . . .

Q: Had Brookins said anything to you at this point?

A: No. he hadn't.

Q: All right, after you got into the still yard or on down closer to where the still was located what did you do?

A: Mr. Brookins and myself walked into the still yard and saw Charlie Johnson in custody of Special Investigator O'Steen. (R. 22).

. . . .

Q: Now, Officer Nowicki, what time of day was it that you first observed the still?

A: It was approximately 2:00 P.M. in the afternoon.

Q: And about what time was it that you observed Mr. Brookins coming down toward the woods?

A: About 20 minutes afterwards.

. . . .

Q: How far from the still would you estimate his residence to be?

A: Approximately 500 yards.

. . . .

Q: Did you understand, based on your investigation, that Mr. Brookins owned a 250 acre farm where the house was located?

A: At that time I didn't.

Q: Did you learn since then?

A: Yes sir. (R. 29).

. . . .

Q: And when you first laid eyes on Mr. Brookins, how far was he from his house?

A: He was approximately 450 yards from his house. (R. 30).

. . . .

Q: Now, your position again, from your point of surveillance to the still itself, I believe you said was 25 yards?

A: About 25.

. . . .

Q: Could you see the still from your position?

A: Parts of it.

Q: Could Mr. Brookins from where you first laid eyes on him walking towards you, could he see the still?

A: He could see the top of it or I from that position. I could see the top of it.

. . . .

Q: Now, was this a heavy wooded area?

A: I would say moderately wooded.

Q: Heavy enough to block one's vision if he was 100 yards away?

A: Yes sir.

Q: How about 75 yards.

A: Possibly.

Q: How about 50 yards?

A: Possibly (R. 31)

Q: How about 25 yards?

A: Not totally.

Q: Did you have an arrest warrant that day to arrest Mr. Brookins?

A: No, I didn't.

Q: Did you have a search warrant to search him?

A: No, I didn't.
Q: All right, up to the point you saw him coming down the path, he was carrying two bags, you say?
A: That's correct.

. . . .

Q: Now, had you see Mr. Brookins down at the still site itself, in the still yard?
A: No, I didn't.
Q: Had you seen Mr. Brookins haul any material or (R. 32), anything to the still?
A: No, I did not.
Q: Did you have any confidential information from any other officer that they had seen him working at the still?
A: That they had seen him?
Q: Yes?
A: No, I didn't.

. . . . (R. 33)

Q: So, you saw a man that you knew to own that farm, did you know Mr. Brookins owned that farm before you arrested him?
A: I had heard that he did.

. . . . (R. 34)

Q: Well, what did you say to him?
A: I asked him his name.
Q: And what did he tell you?
A: He said Ed Brookins.

. . . . (R. 35).

Q: So, you learned his name and what did you do then?
A: I asked him if I could look in his sacks?
Q: And what did he say to that?
A: He gave me the sack.
Q: And you looked in it?
A: Yes sir.

Q: And what did you see, stoppers?
A: The stoppers.
Q: And the lunch?
A: And the lunch, that's correct.
Q: Were you in uniform?
A: We don't wear uniforms.
Q: Well, what did you have on?
A: Green.
Q: And that's customarily worn by Alcohol and Tobacco Tax people?
A: Correct.
Q: Did you have a gun on you plainly where you could see it?
A: That's correct.
. . . . (R. 36).
Q: Generally speaking, he was a violator?
. . . .
A: That he had been arrested for liquor law violations.
Q: Was he convicted, according to your information?
A: At the time I didn't know.
Q: So, you knew him as a man that had been arrested; did you know when he had been arrested?
A: I had heard that he had been arrested.
Q: At that time you had heard it?
A: At that time I had heard he had been arrested back two years ago.
Q: At that time had you heard how many years prior to (R. 37), that time it was that he was arrested?
A: No, I had not.
. . . .
Q: You had heard he had been arrested several times?
A: No, several times, from several people I had heard that Mr. Brookins had been arrested in the past for liquor law violations.
Q: So, that's the reputation that you relied on to stop the man that day and arrest him?

A: That combined with a still in operation right in front of both of us. (R. 38).

Q: To save my having to read this whole matter, Mr. Officer, would you point out in your statement where it relates, if it does, to what you did when you first saw Mr. Brookins (handing statement to witness)?

A: "At this time i went to Brookins and examined the paper sack."

Q: All right, show me on the statement where it is?

A: Pointing on statement.

Q: And is this part of the statement that you were just now referring to, ' "When he reached a point about 25 yards from the still, Brookins looked in my direction and stopped walking. At this time I went to Brookins, examined the paper sack" '- is that the only reference in your report to what happened when you first saw Brookins?

A: (Witness examining statement futher ... That is.

Q: There is no other reference?

A: No. (R. 39).

MATERIAL EXCERPTS FROM TESTIMONY OF MR. EDWARD BROOKINS

BY: MR. TONEY:

Q: Would you state your name, please?

A: Ed Brookins.

. . . .

Q: On January 30 of this year; do you remember the incident the officer testified about?

A: Yes sir.

Q: Were you arrested on that day? (R' 44).

A: Yes sir.

Q: All right, about what time?

A: I would say, I can't say right exactly but I'd say around 1:15, between 1:00 and 1:30.

Q: All right, explain to the Court just what you did that day leading up to that arrest?

A: Starting that morning?

Q: Yes sir; I mean don't go into many details, just hit the highlights¼ ?

A: Well, that morning when I started off, I went to Blakely, Georgia and I picked up Raymond Smith. He runs a shop in Early County, Blakely. I brought him back to the house and he started to working on the truck.

. . . . .

A: And I got my tractor and plowed, got my tractor and plows and went to the field and I plowed until 10 minutes after 12:00.

(R. 45).

A: At 10 minutes after 12:00 I left the field and came to the house and I went to town to pick up my boys. Both of them gets out of school every day at dinner time.

Q: Let me stop you there, up to this point had you heard the noise from any still anywhere in that area anywhere?

A: No sir, I couldn't have. It's a diesel tractor and it makes a lot of racket.

Q: And how far from the still that you later learned, a still later that when you were arrested, how far were you plowing from that still area or the still yard?

A: I would guess it's close to 5 or 600 yards.

. . . . (R. 46).

Q: How far would you estimate that you were piling this brush from where you later learned ther was a still?

A: Well, I've got two gates there and I'd say about 100 yards apart and I was at the first gate; and from the second gate to where this revenue man was standing I would say it was around 150 yards from where I first seen him.

Q: All right, from where you were piling the brush, you were 150 yards to where you saw the Revenue agent?

A: No sir.

Q: Say that again?

A: I would say, it's about from where I was piling the brush to where I seen the Revenue Agent, it would be about (R. 47), 250 yards.

. . . .

Q: Now, at the time you heard the noise where you were piling this brush, could you see the Agent from that point?

A: No sir.

Q. Why did you go down in that direction?

A: I heard a motor running.

Q: What did the motor sound like to you?

A: It just sounded like an engine running and a blowing fuss.

Q: All right, go ahead and tell us what happened?

A: There's a road that goes all the way through and I walked right straight on down the road and I got to the second gate, which was about 150 yards from there to where the Revenue Agent was standing approximately 10 feet in the edge of the woods.

Q: All right now, did you approach the Revenue agent?

A: Yes sir, I did and I called to him.

Q: You called to him, what did you say?

A: I said "Hey there, fellow, what's going on?"

Q: And what did he say?

A: He walked on up to me and he said "Ain't that a liquor still over there?" I said "I don't know what it is." (R. 48). I said "That's my business down here though, I heard that fuss." He said "What's your name?" I said "Ed Brookins." He said "Yeah, that's a liquor still", said "You're under arrest, sit down."

Q: You were later taken to the still site?

A: Yes sir.

Q: Was this still on your land?

A: Yes sir, 191 yards from where he arrested me.

Q: Now, down at the still site that he took you to later, could you look at that and really tell one way or another whether that was on your property or not?

A: It's right on the back side of our farm.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27067

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EDWARD BROOKINS,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

(March 6, 1970)

Before RIVES, COLEMAN, and MORGAN, Circuit Judges.

COLEMAN, Circuit Judge: Edward Brookins was indicted for and found guilty of violating 26 U.S.C. §§5179(a) and 5601(a) (possession of a still and distilling apparatus set up); 5173 and 5601(a) (carrying on the business of a distiller without bond); 5602 (carrying on the business of a distiller with intent to defraud the government of taxes); 5180 and 5681(c) (working at a distillery upon which no sign was placed and kept);

and 5205(a) (2) and 5604(a) (possession of distilled spirits in containers which failed to bear the required internal revenue stamp). The case was tried to the District Judge, without a jury. We reverse.

An agent for the Alcohol and Tobacco Tax Division testified that on January 30, 1968, he, with two other agents, was looking for a whiskey still in the woods, near a creek, about five hundred yards from the Brookins residence. He knew Brookins on sight, and in the hearing on the motion to suppress stated, over objection, that he knew Brookins to be a "major violator" of the liquor laws in that area. This knowledge seems to have been supported by at least one fairly recent conviction for such an offense, as well as upon several arrests which contributed to the unfavorable reputation of the appellant as to such activities. Two of the officers located the still and observed an individual (not Brookins) working thereat. The still was running and its water pump could be heard from a distance of fifty or sixty yards. The odor of mash was detectable for a considerable distance.

The officer posted himself at a point in the edge of the woods and adjacent to a cultivated field, approximately twenty-five yards from the still. From this observation point Brookins was seen walking through the woods, headed in a straight line for the still. He was carrying two small paper bags. He stopped when he saw the agent and was forthwith arrested. One of the paper bags, whether seized before or after the formalities, contained twenty-five corks and a plastic jug spout. The corks found in the bag fitted

plastic jugs found at the still site. Eighteen of those jugs had no corks. The second bag contained a lunch. After the arrest of Brookins the other officer went to the still and arrested its operator, who pleaded guilty to the indictment returned against him.

Brookins was conducted to the still yard and given a complete *Miranda* warning, after which he stated to the officers that he was glad it was all over, that he could not sleep the previous night for fear of impending detection. He admitted that he made the still and its condenser and that he was its owner. He further stated that this was the third time the still had operated. On this particular day approximately eighty gallons of whiskey had been run off. Brookins said that the run had been delayed for about two weeks, due to the delaying effects of cool weather on the fermentation of the mash.

The exact circumstances of the arrest can best be described by quoting the testimony of the arresting agent.

"Q All right now, I'll ask you if you saw the Defendant, Ed Brookins, while you were observing this still?
A Yes, I did.
Q And where did you see him?
A I saw him walking through the woods.
Q Now, tell us where he was walking in relation to the still and in relation to where you were?

A He was walking straight towards the distillery and he was coming — I was down beside the still — and he was coming into it from up above me.

Q Was he walking anywhere close to you or coming in the direction where you were?

A Yes, he would have passed right by me.

Q All right, what did you do when you saw Ed Brookins?

A I let him keep walking toward me.

Q Could you tell whether or not he saw you?

A He did and then he stopped walking.

Q How far away from you was he before he saw you?

A Approximately 10 yards.

Q About 10 yards?

A Yes sir.

Q And was that on a line with the distillery?

A Right; that was on line with the distillery and I was down below him.

Q If he had walked in a straight line, would he have gone by the distillery or in the yard, or where would he have gone?

A He would have walked in the still yard.

Q When he stopped and looked at you, what did you do?

A I approached him.

Q And why did you approach him?

A With the intention to arrest him.

Q *What did you intend to arrest him for?*

A *Possessing an unregistered distillery.*" [Emphasis supplied].[1]

"Q All right, you knew his house was nearby, did you not?

A Yes, I did.

Q And you knew his reputation for being in the whiskey business, didn't you?

A Yes, I did.

Q And you state you could hear the still in operation some 50 yards away when you came up on it?

A That is correct.

Q Now, you walked up to Brookins; what did you say to him or did you see him with anything?

A He was carrying two paper bags.

Q Two paper sacks?

A That's correct."

Brookins testified that he was arrested at a point which was 191 yards from the still and also denied making the incriminating statements attributed to him by the arresting officer.

Brookins contended in the court below, and argues here, that the arrest was without probable cause and therefore unlawful, with the corresponding result that

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[1]Under the circumstances as then existing this was obviously the only possible basis for the arrest. Prior thereto there was nothing to show that Brookins was carrying on the business of a distiller or working at a distillery or in possession of distilled spirits. An unidentified person was actively engaged in these activities but he had not been arrested and there was then no known connection between him and Brookins.

his incriminating statements were inadmissible, *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Obviously, therefore, the crucial issue is whether there was probable cause for the arrest.

In *Henry v. United States*, 361 U.S. 98, 102, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959), the Supreme Court spoke as follows:

> "Evidence required to establish guilt is not necessary. Brinegar v. United States, 338 U.S. 160; Draper v. United States, 358 U.S. 307. On the other hand, good faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. Stacey v. Emery, 97 U.S. 642, 645. And see Director General v. Kastenbaum, 263 U.S. 25, 28; United States v. Di Re, supra, at 592; Giordenello v. United States, supra, at 486. It is important, we think, that this requirement be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen. If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent. Carroll v. United States, 267 U.S. 132, 156. And while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it

must be made with probable cause. Carroll v. United States, supra, at 155-156. This immunity of officers cannot fairly be enlarged without jeopardizing the privacy or security of the citizen. We turn then to the question whether prudent men in the shoes of these officers (Brinegar v. United States, supra, at 175) would have seen enough to permit them to believe that petitioner was violating or had violated the law. We think not."

In the same case, at another point, 361 U.S. 101, the Court said:

"That philosophy later was reflected in the Fourth Amendment. And as the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest. And that principle has survived to this day. See United States v. Di Re, 332 U.S. 581, 593-595; Johnson v. United States, 333 U.S. 10, 13-15; Giordenello v. United States, 357 U.S. 480, 486. Its high water was Johnson v. United States, supra, where the smell of opium coming from a closed room was not enough to support an arrest and search without a warrant. It was against this background that two scholars recently wrote, 'Arrest on mere suspicion collides violently with the basic human right of liberty'."

This Court has consistently followed the principles enunciated in *Henry, Wooten v. United States*, 5 Cir., 1967, 380 F.2d 230, cert. denied 389 U.S. 942; *Nicholson v. United States*, 5 Cir., 1966, 355 F.2d 80, cert. denied 384 U.S. 974; *Miller v. United States*, 5 Cir., 1966, 356 F.2d 63, cert. denied 384 U.S. 912.

Of course, an arrest is not justified by what the subsequent search discloses, *Henry v. United States*, supra; *Johnson v. United States*, 333 U.S. 10, 15.

Stated in elementary terms, the rule is that in determining the validity of an arrest on probable cause, the Court is dealing with "probability" and not with the "certainty" that an offense has been or is being committed, *Clay v. United States*, 8 Cir., 1968, 394 F.2d 281, and each case turns largely on the facts existing at the time of the arrest.

What were the facts known to the officer at the moment he arrested Brookins? He knew that there was a still in operation within five hundred yards of the Brookins home. He knew that at that very moment an unidentified person [not Brookins] was operating the still. There was a field road which began at the Brookins house and ended at the still, although portions of it had been plowed up with a farm disc harrow. The officer saw someone discing the rather large field. He knew that Brookins, within the fairly recent past, had been convicted of a liquor violation and had been charged with other violations. He had never seen Brookins at the still nor had he received credible information from a reliable source that Brookins had any

connection with the still. He saw Brookins approaching the still yard but he did not know what he had in the paper bags. He simply arrested Brookins on sight, but at a time when he was directly approaching the still at a distance of twenty-five yards. He testified specifically that he arrested the appellant for "possessing an unregistered distillery".

That raises the next question, and a very difficult one: At the immediate time of arrest, was there probable cause for a prudent man "in the shoes of the arresting officer" to believe that Brookins was guilty of possessing the still?

In *McFarland v. United States*, 5 Cir., 1960, 273 F.2d 417, this Court discusses the elements essential to the possession of an unlawful still. We defined such possession as follows:

> "Possession of an unlawful still means that the defendant must have some dominion over the property, or some extrinsic circumstances that gives him the right to possess which includes control. It means having, holding or detention of property in one's own power or command. Ownership, whether rightful or wrongful, is not necessary to establish possession. ¶Possession may be defined as having personal charge of, or exercising the rights of management or control over the property in question. Mere presence at the scene of an unlawful distillery with nothing more doesn't constitute possession."

The opinion [Judges Tuttle, Brown, and Wisdon went on to say:

> "There is no doubt that mere presence at a still is not enough in itself to constitute possession of the still."

The opinion contains a careful analysis of our opinion in *Vick v. United States*, 5 Cir., 1954, 216 F.2d 228, in which we directed the acquittal of a defendant in a possession case who was sitting on the ground about ten or fifteen feet from the distillery and attempted to run away from the officers. In *Vick* it had been held that mere presence at or near an unregistered distillery is not sufficient to sustain a conviction. We pointed out in *McFarland* that Vick was not working around the still, had never been observed at the still prior to the raid, there was no evidence that Vick knew anything about the operation of the still, and the jury could well have believed [although it did not] Vick's explanation of his presence at the still. It was further pointed out that Vick's presence did not contribute to the possession or operation of the still.

On the other hand, in *Monnette v. United States*, 5 Cir., 1962, [Judges Jones, Bell, and Simpson] this Court held that an automobile parked at suspected premises and used by a known liquor violator, plus the odor of fermenting mash emanating from the premises, constituted probable cause for the issuance of a search warrant.

In the present case, however, nothing was present which was known to have been used by Brookins.

Twenty-two years ago this Court decided *Matthews v. United States*, 5 Cir., 1947, 177 F.2d 278, [Judges Hutcheson, McCord, and Sibley]. One of the appellants walked down a path toward the distillery and was arrested thirty or forty yards from it. He was carrying a paste-board box containing groceries. He was never shown to have been present at the distillery until arrested and taken there by the officers. These circumstances were held as a matter of law to be insufficient to show that the accused was in possession of the still or carried on the business of a distiller, with or without intent to defraud the United States, or that he worked at the still.

We are reminded, as so often held, *Henry v. United States*, supra, that the evidence required to support probable cause need not rise to that degree necessary to support a guilty verdict. That, however, does not answer the problem in this case. If proof of mere presence at a still, or approaching near unto it on a well defined path, cannot prove the crime then, by the same reasoning, how can it raise the probability, in the absence of anything else, that one only approaching is in possession of the still?

In *Surrett v. United States* [No. 26,675, January 26, 1970] ___ F.2d ___, this Court affirmed a conviction for possessing an unregistered distillery. When the officers approached the still they saw the defendant seated in a pick-up truck, which contained 300 gallons

of whiskey in full view. The truck was stuck in the sand and the defendant was "rocking" it, trying to free it. The truck was about ten feet from 127 barrels of mash. The still, although not running, was hot. It was held that inferences to be drawn from the evidence warranted the conviction. Obviously, the appellant was more than merely present.

Events taking place after the arrest, and under the compulsion of the arrest, proved Brookins guilty as charged in the indictment. The difficulty for the prosecution is that the law, which denounces the crime, also prescribes, in constitutional dimensions, the rules for arresting individuals without warrants. We are confronted with the admonition of the Supreme Court in *Henry*, supra, that

> "It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest."

Certainly, the arresting officer had "strong reason to suspect" that Brookins possessed the still, but under the teachings of *Henry* that was not enough.

We are compelled to hold that this arrest was without probable cause.

It therefore follows that the confessions obtained pursuant to the arrest were inadmissible and the proof was insufficient to establish guilt of the offenses charged in the indictment, *Wong Sun v. United States*, supra.

The judgment of conviction will be reversed and the appellant discharged.

REVERSED.

RIVES, Circuit Judge, specially concurring:

A careful examination of the record convinces me that the seizure of the two paper sacks from Brookins preceded his arrest. Nowicki approached Brookins with the intention to arrest him for possessing an unregistered distillery. However, before telling Brookins that he was under arrest, Nowicki asked him his name and he replied Ed Brookins. Nowicki then asked Brookins if he could look in the two paper sacks he was carrying and Brookins gave him the sacks. In one paper sack he found 25 corks and a severed plastic jug spout and in the other he found a lunch. Nowicki then placed Brookins under arrest and signaled to his fellow officers. That much clearly appears at the bottom of page 21 and on pages 35 and 36 of the record.

There is, and can be, no contention that Brookins surrendered the two paper sacks and their contents voluntarily, for Nowicki was in the garb of an officer and was visibly armed. Brookins' confession came after, and was in all probability induced by, the discovery of the contents of the two sacks.

Nowicki acted in an emergency. If he had allowed Brookins to continue on directly to the still, he could reasonably apprehend that the carefully planned surveillance of the still would be frustrated, the operator

of the still might be warned and might possibly escape, and evidence might be destroyed. Nowicki was justified in stopping Brookins to avoid interference with the raid and with the arrest of the operator of the still.

Was he justified further in seizing the two paper sacks and their contents? On this point we do not write on a clean slate. The Supreme Court has recently stated in *Sibron v. New York*, 1968, 392 U.S. 40, 63, that "It is axiomatic that an incident search may not precede an arrest and serve as part of its justification." Again in the companion *Peters* case, the Court repeated "* * * a search incidental to a lawful arrest may not precede the arrest and serve as part of its justification." 392 U.S. at 67. In *Chimel v. California*, 1969, 395 U.S. 752, 762, the Court pointedly drew the comparison between the two "stop-and-frisk" cases, *Terry v. Ohio*, 1968, 392 U.S. 1, 19, 29, and *Sibron v. New York*, 1968, 392 U.S. 40, and pointed out that a protective search for weapons might be justified, as in *Terry*, while a search for evidence not limited to the objective of protection would have to be disapproved, as in *Sibron*.

It therefore appears that the seizure of the two paper sacks cannot be justified as incidental to Brookins' arrest for possessing an unregistered distillery because the seizure preceded the arrest and served as part of its justification. *Sibron* and *Peters*, *supra*, 392 U.S. 63, 67. The seizure of the sacks cannot be justified as incidental to Nowicki's stopping Brookins to prevent him from frustrating the raid and interfering with the arrest of the operator of the still (assuming that he was stopped for such purpose), because the seizure

was made in order to find evidence and was not limited to the objective of protection.

True, it would appear that Nowicki acted in the emergency which confronted him as a reasonably prudent officer should act, and with a minimum of intrusion upon Brookins' privacy or invasion of his personal security. If we wrote upon a clean slate, I would say that under all of the circumstances there was no unreasonable seizure violative of the Fourth Amendment. Under the controlling authorities, however, I am forced to the conclusion that the evidence obtained as a result of the seizure was inadmissible, and I reluctantly concur in the judgment of reversal.

MORGAN, Circuit Judge.

I concur in the reversal of the conviction for the reasons set forth in Judge Rives' special concurring opinion.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27067

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EDWARD BROOKINS,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

(October 22, 1970)

ON PETITION FOR REHEARING

Before RIVES, COLEMAN and MORGAN, Circuit Judges.

RIVES, Circuit Judge: Our mistake on original hearing[1] was in treating the offense for which the appellant Brookins was arrested as possessing an unregistered still proscribed by subsection (a) (1) of

[1]Opinion reported, 423 F.2d 463.

Title 26, section 5601, U.S.C.,[2] rather than that of carrying on the business of a distiller proscribed by subsection (a) (4) of the same section 5601.[3] The two crimes appear closely related, but there is a critical difference. As to carrying on the business of a distiller, the Supreme Court sustained the constitutionality of the presumption created by a 1958 Act of Congress now appearing as subsection (b) (2) of section 5601,[4] upon the rationale quoted in the margin.[5] Contrariwise, as

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[2]"(a) Offenses. — Any person who —

"(1) *Unregistered stills.* — has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a) * * *."

[3]"(a) Offenses. — Any person who —

* * * * * * * *

"(4) *Failure or refusal of distiller or rectifier to give bond.* — carries on the business of a distiller or rectifier without having given bond as required by law ***."

[4]"(b) Presumptions. —

* * * * * * * *

"(2) *Failure or refusal of distiller or rectifier to give bond.* — Whenever on trial for violation of subsection (a) (4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

[5]"The rationality of the inference provided by §5601 (b) (2) must be viewed in the context of the broad substantive offense it supports. Section 5601 (a) (4) prescribes 'carrying on' the enterprise of illegal distillation — an offense which is one of the most comprehensive of the criminal statutes designed to stop the production and sale of untaxed liquor. See *Vukich v. United States*, 28 F.2d 666, 669 (C.A. 9th Cir.). Those who aid and abet the enterpriser come within the statute's reach by virtue of 18 U.S.C. § 2 (1958 ed.). *United States v. Giuliano*, 263 F.2d 582 (C.A. 3d Cir.). Suppliers, haulers, and a host of other functionaries have been convicted under the statute. See *United States v. Pritchard*, 55 F.Supp. 201 (D.C.W.D.S.C.), aff'd 145 F.2d 240 (C.A. 4th Cir.) Congress was undoubtedly

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[1]Opinion reported, 423 F.2d 463.

to possessing an unregistered still, the Supreme Court held unconstitutional a like presumption created by the same 1958 Act now appearing as subsection (b) (1) of section 5601.[6] We quote in the margin part of the opinion which points out the essential difference between the two offenses.[7]

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aware that manufacturers of illegal liquor are notorious for the deftness with which they locate arcane spots for plying their trade. Legislative recognition of the implications of seclusion only confirms what the folklore teaches — that strangers to the illegal business rarely penetrate the curtain of secrecy.[6] We therefore hold that §5601 (b) (2) satisfies the test of *Tot v. United States, supra.* [319 U.S. 463].

"[6] Very few of the illicit distillers allow any one, except their most intimate friends, to approach their distilleries. Such places, as a rule, are forbidden ground, for the reason that when the violators are arrested it is a difficult matter to prove them guilty, when so few persons have ever seen them operating their distilleries.' Atkinson, After the Moonshiners, By One of the Raiders, at p. 23.

" 'The first requisite for an illicit still is a good stream of cool water . . . .

" 'The next requisite is seclusion. It must be placed where no one ever travels, or even thinks of traveling.' *Id.*, at p. 18."

United States v. Gainey, 1965, 380 U.S. 63, 67, 68, & n. 6.

[6]"(b) *Presumptions.* —

"(1) *Unregistered stills.* — Whenever on trial for violation of subsection (a) (1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

[7]"Just last Term, in *United States v. Gainey*, 380 U.S. 63, the Court passed upon the validity of a companion section to § 5601 (b) (1) of the Internal Revenue Code. The Constitutionality of the legislation was held to depend upon the 'rationality of the connection "between the facts proved and the ultimate fact presumed." ' 380 U.S., at 66. Tested by this rule, the Court

With some exceptions to be noted, the facts are fully and accurately stated in Judge Coleman's original opinion (423 F. 2d at 464 and 465) and in the writer's special concurrence (423 F. 2d at 468). An inaccurate statement occurs on p. 467, that Nowicki, the arresting officer, "knew that Brookins, within the fairly recent past, had been convicted of a liquor violation" and a similar mistake occurs on p. 464. The facts are that Brookins had been so convicted in 1963, some five years prior to his arrest (R. p. 56), but Nowicki admitted that at the time of arrest he did not know of Brookins' conviction (R. p. 37).

In the original opinion we failed to call attention to the following part of Nowicki's testimony:

"Q. Now, did you station yourself somewhere to watch that distillery?

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sustained the provision of 26 U.S.C. § 5601 (b) (2) declaring presence at a still to be sufficient evidence to authorize conviction under 26 U.S.C. § 5601 (a) (4) for carrying on the business of the distillery without giving the required bond. Noting that almost anyone at the site of a secret still could reasonably be said to be carrying on the business or aiding or abetting it and that Congress had accorded the evidence of presence only its 'natural probative force,' the Court sustained the presumption.

"This case is markedly different from *Gainey, supra.* Congress has chosen in the relevant provisions of the Internal Revenue Code to focus upon various phases and aspects of the distilling business and to make each of them a separate crime. Count 1 of this indictment charges 'possession, custody and . . . control' of an illegal still as a separate, distinct offense. Section 5601 (a) (1) obviously has a much narrower coverage than has § 5601 (a) (4) with its sweeping prohibition of carrying on a distilling business."

United States v. Romano, 1965, 382 U.S. 136, 139, 140.

"A. Yes, I did.
"Q. And why did you do that rather than going on in and arresting Johnson?
"A. We were expecting the owner of the distillery to come down to it." (R. p. 18.)

Of more significance is the mistaken emphasis (423 F.2d at 465) placed upon a part of Nowicki's testimony, and the erroneous conclusion drawn in the attached footnote:

"'Q. And why did you approach him?
A. With the intention to arrest him.
Q. *What did you intend to arrest him for?*
A. *Possessing an unregistered distillery.*' [Emphasis supplied].[1]

"[1].Under the circumstances as then existing this was obviously the only possible basis for the arrest. Prior thereto there was nothing to show that Brookins was carrying on the business of a distiller or working at a distillery or in possession of distilled spirits. An unidentified person was actively engaged in these activities but he had not been arrested and there was then no known connection between him and Brookins." (423 F.2d at 465 & n. 1.)

Actually we find no testimony that Nowicki ever disclosed to Brookins his intention to arrest him for possessing an unregistered still. Nowicki merely testified that "I placed Brookins under arrest" (R. p. 21) after finding the 25 corks, the severed jug spout,

and the lunch in the two paper sacks which Brookins was carrying, and before the arrival of his fellow officer O'Steen. Brookins' version was more explicit:

> "A. He walked on up to me and he said 'Ain't that a liquor still over there?' I said 'I don't know what it is.' I said 'That's my business down here though, I heard that fuss.' He said 'What's your name?' I said 'Ed Brookins.' He said 'Yeah, that's a liquor still,' said 'You're under arrest, sit down.'" (R. pp. 48, 49.)

Thus, neither arrest participant testified to any statement by Officer Nowicki that the ground of arrest was for possessing an unregistered still. Apparently that ground remained a mere undisclosed intention.*

The conclusion drawn in the heretofore quoted footnote to the original opinion (423 F.2d 485, n. 1) that possessing an unregistered still was "the only possible basis for the arrest" is a mistake. Nowicki had probable cause to arrest Brookins for carrying on the business of a distiller. At the time of the arrest, Nowicki and Brookins were about 25 yards from the still, witnessing it in operation, and smelling the mash. Just at that time Nowicki had expected the owner to appear. Brookins was making a beeline for the still. No-

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*This is mentioned only for the sake of accuracy, for we will presently develop that, even if Nowicki had positively told Brookins the ground of his arrest was for possession of an unregistered still, the arrest should nonetheless be held legal because probable cause existed to arrest for carrying on the business of a distiller.

wicki knew that the still was only 500 yards from Brookins' home, and he knew Brookins' reputation as a "major violator" of the liquor laws in that area. It was reasonable for Nowicki to entertain the belief that Brookins had some part in furthering the operation of the still.[8] Carrying on the business of a distiller was clearly a reasonable basis for Brookins' arrest.

Nowicki was a United States Treasury Agent of the Alcohol and Tobacco Tax Division.[9] His authority[10] to make arrests and seizures was conferred by 26 U.S.C. § 7608 (a) (3) and (4):

> "§ 7608. *Authority of internal revenue enforcement officers*
>
> "(a) *Enforcement of subtitle E [Alcohol, Tobacco and Certain Other Excise Taxes, including Chap. 51 §§ 5001-5066] and other laws pertaining to liquor, tobacco, and firearms.*- Any investigator, agent, or other internal revenue officer by whatever term designated, whom the Secretary or his delegate charges with the duty of enforcing any of the criminal, seizure, or forfeiture provisions of subtitle E or of any other law of the United States pertaining to the commodities subject to tax under such subtitle for the enforcement of which the Secretary or his delegate is responsible, may —

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[8] Of course, aiding and abetting in carrying on the business of a distiller would make Brookins punishable as a principal. 18 U.S.C. §2.

[9] See United States v. Littlejohn, E.D.N.Y., 1966, 269 F.Supp. 278, 279.

[10] See United States v. Costner, E.D. Tenn., 1963, 217 F.Supp. 644, 645, n. 1.

. . . . . .

"(3) in respect to the performance of such duty, make arrests without warrant for any offense against the United States committed in his presence, or for any felony cognizable under the laws of the United States if he has reasonable grounds to believe that the person to be arrested has committed, or is committing, such felony; and

"(4) in respect to the performance of such duty, make seizures of property subject to forfeiture to the United States."[12]

The finding on original hearing of lack of probable cause for the arrest of Brookins was based on the view that Nowicki had to have probable cause to arrest Brookins for possessing an unregistered still because Nowicki testified that such was his intention. Even if that intention had ripened into a statement of that offense as the ground for arrest, the existence of probable cause for arrest for carrying on the business of a distiller would prevent the arrest from being held illegal. That much is now firmly established by the well-reasoned opinion in *Klingler v. United States*, 8 Cir. 1969, 409 F.2d 299, 304, 305, cert. den. 396 U.S. 859.[13]

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[12]It may be noted that the statute does not require the officer to inform the accused of the ground for his arrest. Apparently the earliest time that exact information of the complaint against him has to be given to a person arrested by an officer without a warrant is when he is taken before a commissioner. See Rule 5(a) and (b), Fed.R.Crim.P.

[13]Followed in United States v. Valentine, 8 Cir. 1970, 427 F.2d 1944, 1947.

If Brookins had been arrested at the still itself, his presence there would have justified his conviction for carrying on the business of a distiller. Under the existing circumstances, Brookins' direct approach to the still at a time when Nowicki expected the owner to appear and at a place about 25 yards from the still, then in full operation, amply furnished probable cause to believe that he intended to be present at the still site for some reason connected with the operation of the still. Thus, probable cause for the arrest existed independently of the fruits of the search of the two paper bags. The arrest was perfected almost immediately after the contents of the bags were revealed. In these circumstances it is not material that the search preceded the arrest. *Lovelace v. United States*, 5 Cir. 1966, 357 F.2d 306, 310; *Henderson v. United States*, 5 Cir. 1968, 405 F.2d 874, 875; Annotation, 89 A.L.R.2d 715, at 780, et seq.

Rehearing is granted and the judgment of conviction is affirmed.

AFFIRMED.

COLEMAN, Circuit Judge, Dissenting.

I respectfully dissent. The views originally expressed at 433 F.2d 483 remain unchanged.

The majority adheres to its original view that Brookins could not lawfully have been arrested for the possession of an unregistered still. The ground is shifted to the entirely new proposition that he could have

been lawfully arrested for carrying on the business of a distiller. There is no getting around the testimony of the trained and experienced agent that he arrested Brookins for possessing a still, NOT for carrying on the business of a distiller.

If, however, a factor which had nothing to do with the arrest when made is to be injected as a life-saving hypodermic for an invalid arrest, then I am of the opinion that there was no probable cause to arrest Brookins for carrying on the business of a distiller.

Walking through a field with a paper sack, even if in the direction of the distillery, is not enough for me to hold that there was probable cause for an arrest for carrying on the business of a distiller. And this is especially true if, as in this case, there is already somebody at the distillery and operating it.

My highly esteemed Brethren of the majority say that "If Brookins had been arrested at the still itself, his presence there would have justified his conviction for carrying on the business of a distiller". The point is that he was not at the still. I am unable to comprehend that walking in an open field on one's property in the direction of a still can be made legally synonymous to being present at the still. What Brookins "might do" is not enough. The crucial factor is what he was actually doing when the officer stopped him.

I am compelled to dissent.

Adm. Office. U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 27067

October Term, 1969

D. C. Docket No. Cr. 5333

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD BROOKINS,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

Before RIVES, COLEMAN and MORGAN, Circuit Judges.

JUDGMENT ON PETITION FOR REHEARING

This cause came on to be heard on plaintiff-appellee's petition for rehearing;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the rehearing in the above case is granted and the judgment of conviction is affirmed in accordance with the opinion of this Court.

October 22, 1970

Coleman, Circuit Judge, Dissenting.

Issued As Mandate: